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COURT OF APPEALS NO. 24981-6-III

SUPREME COURT
OF THE STATE OF WASHINGTON

AMBER L. KAPPELMAN,

Petitioner,

vs.

THEODORE J. LUTZ,

Respondent.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

The petitioner is Amber L Kappelman, who was the appellant in the Court of Appeals and the plaintiff at trial.

II. COURT OF APPEALS DECISION

Kappelman seeks review of the decision in *Amber L. Kappelman v. Theodore J. Lutz*___ Wn. App. ___, ___ P.3d ___, 2007 Wash. App. Lexis 2988 (2007). The decision was filed on November 6, 2007, and was published. One judge on the three-judge panel dissented A copy of the decision, including the Dissenting opinion, is Appendix A (1 through 20).

III. ISSUES PRESENTED FOR REVIEW

Issue 1. Did the trial court have discretion to exclude evidence of a statutory violation that met the criteria of the *Restatement (Second) of Torts* § 286 (1965) on the basis that only evidence of common law negligence could be presented to the jury?

IV. STATEMENT OF THE CASE

Kappelman brought this negligence personal injury action against a motorcycle driver (defendant Lutz) for injuries she suffered, while his passenger, in a motorcycle accident. The Court of Appeals stated the facts thus:

> Theodore J. Lutz took Amber L. Kappelman for a ride on his motorcycle at night. He had only an instructional permit. He did not have a motorcycle endorsement. And so he could not legally carry passengers or drive at night. He struck a deer while on the trip with Ms. Kappelman and she was injured.

She sued him for damages.

Mr. Lutz moved at trial to exclude evidence that he was not properly licensed. He argued that the evidence was not relevant and that the prejudicial value of the evidence outweighed its probative value. The trial judge agreed and refused to admit evidence that Mr. Lutz did not have the appropriate state license to carry passengers on his motorcycle or to drive it at night. And the trial judge refused to admit evidence that Mr. Lutz had violated the terms of his permit.[1]

Ms. Kappelman showed that she had no experience on motorcycles. She showed that she was not properly garbed for the ride; she wore only jeans, a tank top, zip-up sweatshirt, and sandals. She showed that Mr. Lutz probably made errors in judgment in maneuvering his motorcycle as he tried to avoid the deer. She showed he was speeding. She showed that he hit the brakes and lost control of the motorcycle. And she showed that all of this took place at night. The jury nonetheless returned a verdict in favor of Mr. Lutz.

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[1] RCW 46.20.500 - RCW 46.20.520, and RCW 46.81A.001 - RCW 46.81A.900, set forth Washington's licensing and safety skills education scheme for motorcyclists. One must have a motorcycle endorsement to operate a motorcycle on a public highway. RCW 46.20.500(1). Lutz held a 90 day instruction permit under RCW 46.20.510. (Traffic Citation, CP 9 - the citation also was attached as Appendix 1 to Kappelman's Opening Brief to the Court of Appeals.) A 90 day instruction permit is available to licensed drivers, but it forbids the holder to carry passengers or drive a motorcycle "during the hours of darkness" before taking the driving test required for a full motorcycle endorsement. RCW 46.20.510(1), (2). "Hours of darkness" are from one-half hour after sunset to one-half hour before sunrise. RCW 46.04.200. The driving test "emphasize[s] maneuvers necessary for on-street operation, including emergency braking and turning as may be required to avoid an impending collision." RCW 46.20.515. This test may be waived by the Department of Licensing for those who "satisfactorily complete the voluntary motorcycle operator training and education program authorized under RCW 46.20.520, or who satisfactorily complete a private motorcycle skills education course that has been certified by the department under RCW 46.81A.020." RCW 46.20.515. RCW 46.20.520 establishes a "motorcycle safety education advisory board" to assist the Director of Licensing in developing a motorcycle training education program that "emphasizes driver safety" and whose main purpose is to promote safety. RCW 46.20.520(3).

Kappelman v. Lutz, ___ Wn. App. ___, ___ P.3d ___, 2007 Wash. App. Lexis 2988, at pp. 1 -2 (2007)(A-2). Kappelman accepts this statement of facts for purposes of this review , but adds:

> The subject accident occurred about ½ hour after sunset on June 19, 2000. RP 1-2 (Motions *in Limine*, September 9, 2005). Lutz was driving a newly-purchased high-performance motorcycle. RP 184-185. Although by statute Lutz was driving the motorcycle during an "hour of darkness" (RCW 46.04.200), it was dusk, Lusk had his headlights on and he admitted he could see the deer clearly. RP 192, 193. Lutz plead guilty to a citation for lacking proper licensure at the time of the accident. RP 9 (Motions *in Limine*, September 9, 2005.) Kappelman testified she felt as if she were being "sucked off" the motorcycle by its acceleration. RP 72. Plaintiff's expert reconstructionist's unopposed testimony was that, based on the physical evidence, Lutz was conservatively traveling from 75-80 mph when he spotted the deer. RP 303.
>
> Ms. Kappelman was not merely inexperienced on motorcycles- this was her first ride. RP 61. Lutz rapidly accelerated from Husum, the town they left just before the accident. RP 72. Lutz admitted he exceeded the posted speed limit before the accident. RP 204. Lutz initially steered the motorcycle to the right shoulder of the road to avoid the deer. RP 193. Only later did he brake. RP 194-196.

V. ARGUMENT

A. The Trial and Appellate Courts Ignored This Court's Decisions, the *Restatement (Second) of Torts § 286* And The Legislature's Mandate By Excluding Evidence of Lutz's Violation Of His Motorcycle Instruction Permit Restrictions

This court should accept review because the trial judge's original ruling, excluding certain evidence, was in error and contrary to established Washington decisional law and statutes, because the Court of Appeals

continued that error by its decision and because the Court of Appeals ruling sets a dangerous precedent giving trial judges discretion to ignore legislative directives. The appellate court's decision conflicts with this court's decisions adopting the *Restatement (Second) of Torts* § 286 (1965), this court's decisions on admissibility of evidence of a statutory violation to show negligence, and the legislature's directive on admissibility of evidence of a statutory violation to show negligence. Further, in reaching its decision, the Court of Appeals misconstrued and wrongly relied on a prior decision of Division II of the Court of Appeals. RAP 13.4(b).

1. Evidence of Lutz's Violation Of His Instructional Permit Was Admissible Under Established Washington Law

The starting point is explaining what the proper analysis should have been under Washington law and the trial court's basic error.

Lutz had a 90 day instruction permit that forbad him from carrying a passenger or operating his motorcycle on the road during a statutory 'hour of darkness'. The trial judge *in limine* excluded evidence of the permit and violation of its restrictions (including Lutz's guilty plea to a citation for violating his permit by carrying a passenger and driving during an hour of darkness). RP 16 (Motions *in Limine*, September 9, 2005.[2]

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[2] Kappleman's attorney asked the trial court to reconsider its ruling at the beginning of trial (and the trial judge declined to do so) and then excepted before the jury was charged. CP 24 -29, RP 11, 360.

RCW 5.40.050, enacted in 1986, provides:

> A breach of a duty imposed by statute, ordinance, or administrative rule shall not be considered negligence per se, but may be considered by the trier of fact as evidence of negligence ....

RCW 5.40.050 directed that evidence of a breach of statutory duty is evidence of negligence although not conclusive. *Pudmaroff v. Allen*, 138 Wn.2d 55, 977 P.2d 574 (1999) (defendant motorist's breach of statutory duty is evidence of negligence that, absent contrary evidence from motorist, entitles plaintiff to summary judgment); *Yurkovich v. Rose,* 68 Wn. App. 643, 654, 847 P.2d 925, *rev. denied*, 121 Wn.2d 1029 (1993)(under RCW 5.40.050 breach of a statute is admissible as evidence of negligence that absent evidence of excuse or justification entitles plaintiff to a directed verdict).

Further, a statute can set a standard of care beyond ordinary care when the elements of *Restatement (Second) of Torts* § 286 (1965), discussed below, are present. *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 270, 96 P.3d 386 (2004); *Estate of Kelly v. Falin,* 127 Wn.2d 31, 38 n. 2, 896 P.2d 1245 (1995) (noting *Restatement* requirements but finding they were not met in case before it). A party who adduces evidence of a breach of statutory duty is **entitled** to a jury instruction to that effect (and of course is entitled to adduce that evidence). *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 273 - 275, 96 P.3d 386 (2004). Kappelman submitted a jury instruction on

statutory negligence based on RCW 5.40.050 and *Restatement (Second) Torts,* § 286 (1965), but the judge limited it to Mr. Lutz's exceeding the speed limit (RP 367), having ruled *in limine* that evidence of Lutz's motorcycle permit violations was irrelevant. The trial judge in *Barrett, supra,* committed error by forbidding mention of, and not instructing on, the statutory standard for a tavern keeper - that it not serve a customer "apparently under the influence of alcohol" - and instead instructing on the common law standard of liability that a tavern keeper not serve an "obviously intoxicated" customer. The trial judge here similarly erred by ignoring the statutory standard that entitled Kappelman to introduce evidence of Lutz's violation to show negligence and to establish a standard of care beyond ordinary care.

This court adopted the *Restatement (Second) of Torts* § 286 (1965) before enactment of RCW 5.40.050 in 1986. *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 269 - 272, 96 P.3d 386 (2004); *Kness v. Truck Trailer Equip. Co.*, 81 Wn.2d 251, 257, 501 P.2d 285 (1972). *Restatement (Second) of Torts* § 286 provides the criteria a court should use to decide whether to apply a legislative standard of conduct in a negligence case. Under *Restatement (Second) of Torts* § 286, the court will adopt as the standard of reasonable conduct the requirements of a legislative enactment whose purpose is wholly or partly:

(a) to protect a class of persons which includes the one whose interest is invaded,

(b) to protect the particular interest which is invaded,

(c) to protect that interest against the kind of harm which has resulted, and

(d) to protect that interest against the particular hazard from which the harm results.[3]

See, Barrett v. Lucky Seven Saloon, Inc., 152 Wn.2d 259, 269 - 270, 96 P.3d 386 (2004). Here, Kappelman showed these criteria were met - the statute was meant to protect her (as a motorcycle passenger and as a member of the traveling public) from personal injury caused by motorcycle permittees such as Lutz.[4] The statute sought to protect her by forbidding permittees to carry passengers or drive at night.

The trial judge did not even consider the possible application of *Restatement (Second) of Torts, § 286* - he summarily decided that evidence

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[3] *Restatement (Second) of Torts* § 286 (1965) provides:

The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part

(a) to protect a class of persons which includes the one whose interest is invaded,

(b) to protect the particular interest which is invaded,

(c) to protect that interest against the kind of harm which has resulted, and

(d) to protect that interest against the particular hazard from which the harm results.

[4] Application of the *Restatement (Second) of Torts § 286* was explained in detail in Kappelman's Opening Brief to the Court of Appeals at pp 18 - 20.

of Lutz's permit violation was not relevant. *See, Kappelman v. Lutz,* ___ Wn. App. ___, ___ P.3d ___, 2007 Wash. App. Lexis 2988, at pp. 16-18 (2007)(A-14-16).[5] He did so even though he acknowledged that Lutz's inexperience was relevant! RP (Motions) at 16, cited by the Dissent below at 2007 Wash. App. Lexis 2988, at p 17 (A-15). And, as noted by the dissenting judge below, "evidence of the statutory violation was not only relevant but necessary to provide the jury a context in which to evaluate Mr. Lutz's inexperience." *Kappelman v. Lutz,* ___ Wn. App. ___, ___ P.3d ___, 2007 Wash. App. Lexis 2988, at p 18 (2007)(A-15).

Under the trial court's ruling, an airplane pilot's lack of licensure would be inadmissible in a negligence case arising from a crash, as would a drunk driver's illegal intoxication - only his conduct in the crash would be relevant. Further, evidence that a driver exceeded the posted speed would be inadmissible. Indeed, in this case, the trial judge was inconsistent in that he allowed evidence that Lutz exceeded the posted speed limit. RP 204.

2. The Court of Appeals Used the Wrong Standard to Evaluate Whether The Trial Judge Acted Within His Discretion in Excluding Evidence of Lutz's Instruction Permit (and Violation of Its Restrictions)

The Court of Appeals correctly noted the general rule that the trial judge has discretion to exclude evidence, reversible only for an 'abuse of

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[5]The trial court also ruled that the motorcycle endorsement violation evidence would be prejudical, but as shown below at p. 11, fn. 6, the potential "prejudice" was that the jury might find the violations relevant, which RCW 5.40.050 expressly allows.

discretion'. It further noted that there is generally no abuse when the trial judge had tenable grounds or reasons to exclude the evidence. *Kappelman v. Lutz*, ___ Wn. App. ___, ___ P.3d ___, 2007 Wash. App. Lexis 2988, at pp. 2-3 (2007)(A-3).

The majority erred, though, in not recognizing that the trial court's grounds of decision were untenable because they were not based on the proper legal standard. *T.S. v. Boy Scouts of Am.,* 157 Wn.2d 416, 423 - 424, 138 P.3d 1053 (2006). This was cited by the dissenting judge at 2007 Wash. App. Lexis 2988, at pp. 18-19 (A-16).

The majority was not only wrong, but it dangerously empowers trial judges to countermand legislative directives. Here, the legislature determined that the fact-finder may consider a breach of a duty imposed by statute as evidence of negligence. RCW 5.40.050. It did **not** say this directive on relevance was at the judge's unfettered discretion. But the appellate court's ruling empowers just that; i.e., it allows the trial judge, in his or her discretion, to decide whether evidence of a statutory violation is relevant, and thus to override a legislative command. It is important to both to correct case decision-making and proper respect for legislative powers that this court clarify the extent of the trial court's ability to exclude evidence of statutory violations and the scope of appellate review.

It is clear, too, that although the trial judge ostensibly excluded the evidence both on relevance and prejudice grounds, his real ground was lack of relevance under ER 401:

> **In this case, however, I can't find that the fact that Mr. Lutz was operating without a valid endorsement is really relevant to how he operated the motorcycle.**

(Emphasis added) RP 15 (Motions *in Limine*, September 9, 2005), *quoted* in, *Kappelman v. Lutz*, ___ Wn. App. ___, ___ P.3d ___, 2007 Wash. App. Lexis 2988, at p. 3 (2007)(A-3). In direct violation of *Restatement (Second) of Torts, § 286*, he decided that only common law negligence was relevant:

> The real issue in this case is was he ... was he negligent? Was he speeding? Was he not keeping a proper lookout? Did he lose control of the motorcycle because of his negligence? Did that cause the injury? ... Mr. Lutz could have been fully qualified as a motorcycle operator and still be negligent. The fact that he wasn't fully qualified under state law as a motorcycle operator doesn't mean that he was or wasn't negligent.

(Ellipses in original) RP 15 (Motions *in Limine*, September 9, 2005), *quoted* in, *Kappelman v. Lutz*, ___ Wn. App. ___, ___ P.3d ___, 2007 Wash. App. Lexis 2988, at p. 3 (2007) (A-3). He also said:

> So I am holding that it is irrelevant in this case for evidence to be introduced that Mr. Lutz was operating without a motorcycle endorsement under an instructional permit and that he was violating an instructional permit.

RP 16 (Motions *in Limine*, September 9, 2005).

It is also clear that the 'prejudice' the judge feared was the prospect that the jury would find the 'licensure' evidence relevant. He said:

> To admit that .. into evidence that he also did not have a motorcycle endorsement I believe, first of all, is **highly prejudicial and we all know that juries often make decisions based on things like that and that's not what a jury should be making a decision on in this case...** The fact that he wasn't fully qualified under state law as a motorcycle operator doesn't mean that he was or wasn't negligent.

(Emphasis added) (First ellipses in original, second added) RP 15 (Motions *in Limine*, September 9, 2005). In other words, the trial judge disagreed with this court's pronouncements for over 40 years on *Restatement (Second) of Torts, § 286* and the **legislature's directive** in RCW 5.40.050. He decided that the jury should not consider the statutory violation because he believed a jury would be persuaded by such evidence, and he considered that somehow improper. But, that was not his decision to make. The legislature said that a jury should consider such evidence, and the trial judge had no right to prevent them from doing so. It is telling that the 'prejudice' the trial judge feared was that the jury might find relevant the very evidence the legislature determined it was entitled to consider as relevant![6] The majority of the appellate court approved this judicial overstepping of authority.

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[6] Wash. R. Evid. 403 protects against "unfair prejudice" substantially outweighing probativity, not from the fair prejudice of probative evidence. It is clear that here the trial judge found prejudice from the prospect that the jury would properly find the licensure evidence relevant.

3. The Court of Appeals Wrongly Read Division II's 1990 Decision In *Holz v. Burlington Northern Railroad Company* and Ruled Contrary to *Restatement (Second) of Torts § 286 (1965)* and this Court's Decision in *White v Peters*

The court of appeals' decision, enabled by its misreading of *Holz v. Burlington Northern Railroad Company*, 58 Wn. App. 704, 794 P.2d 1304 (1990), violated the holding of this court in *White v. Peters,* 52 Wn.2d 824, 329P.2d 471 (1958) and *Restatement (Second) of Torts* § 286 (1965) .

In *Holz v. Burlington Northern Railroad Company*, 58 Wn. App. 704, 794 P.2d 1304 (1990), Division II of the Court of Appeals affirmed the trial court's exclusion of a motorcycle operator's lack of endorsement. *Holz* was a wrongful death action arising when an unlicensed motorcycle operator died from colliding at night with defendant's unlit (and not visible) rail tank car, which was parked straddling a county road.

As the dissent below noted, *Holz* was decided on the narrow ground that "no reasonable jury could find a causal link between the statutory violation and the accident". *Kappelman v. Lutz,* ___ Wn. App. ___, ___ P.3d ___, 2007 Wash. App. Lexis 2988, at p. 22 (A-19). Much as licensure would have made no causal difference if a boulder had suddenly tumbled off a cliff and struck Mr. Lutz's motorcycle - the improperly parked railroad car was unlit and would have been hit by a motorcylist regardless of licensure.[7] Here,

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[7]As noted above, the defendant railroad in *Holz* did not even argue that the decedent's lack of licensure played any causal role in the accident.

the trial judge did not base his decision on such a 'lack of possible causation' finding - rather he ruled that only common law negligence mattered and that the Mr. Lutz's licensure status was irrelevant to that. RP 16 (Motions *in Limine,* September 9, 2005).[8] He never reached the question of the application of the *Restatement* criteria. But Lutz's experience was very much at issue and it was appropriate for Kappelman to show by Lutz's statutory violation that he violated the legislative determination that a driver of his experience level was negligent to carry a passenger and drive at night.[9]

Moreover, in *Holz* the defendant railroad did not even argue that the decedent was less experienced or knowledgeable than a holder of a motorcycle endorsement. *Kappelman v. Lutz,* ___ Wn. App. ___, ___ P.3d ___, 2007 Wash. App. Lexis 2988, at p. 23. (A-19)

There is another important differences between *Holz* and this case, relating directly to a criterium under *Restatement (Second) of Torts* § 286

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[8]The majority decision below justified the trial judge's decision as within his discretion, but he exercised his "discretion" to decide that only common law negligence mattered and that Lutz's licensure was irrelevant to that. *Kappelman v. Lutz*, 2007 Wash. App. Lexis 2988, at pp. 3-4, (A-3, A-4) . This was in effect a grant of discretion to disagree with the legislature's determination, in RCW 5.40.050, establishing a standard of conduct beyond ordinary care.

[9]Kappelman's expert reconstructionist Robert Stearns was allowed to testify that lack of training increases the likelihood of an accident. RP 271; *Kappelman v. Lutz,* ___ Wn. App. ___, ___ P.3d ___, 2007 Wash. App. Lexis 2988, at p. 6 (A-5). This is precisely what RCW 46.04.200 is aimed at in requiring one to undergo accident avoidance skills training, including "emergency braking"and "turning as may be required to avoid an impending collision", before qualifying for an unrestricted motorcycle endorsement.

(1965) and this court's decision in *White v. Peters,* 52 Wn.2d 824, 329 P.2d 471 (1958). It is that here the evidence was offered by a party (Kappelman - a passenger) within the class the licensing statute meant to protect. *See,* Dissent at 2007 Wash. App. Lexis 2988, at p. 20, (A-17). In *Holz* it was not - it was offered by the defendant railroad company, which was not a member of the statute's protected class.[10] The motorcycle licensing statute was not meant to shield tortfeasing railroads from liability when motorcyclists crash into their improperly parked rail cars!

Of course, Mr. Lutz cannot deny there was sufficient evidence to create a jury question of a causal connection between his lack of proper licensure and the accident. The Court of Appeals acknowledged that Lutz made errors in judgment - the very thing that training before licensure under the statute addresses. *Kappelman v. Lutz,* ___ Wn. App. ___, ___ P.3d ___, 2007 Wash. App. Lexis 2988, at pp. 6 - 7(A-6).

This case is more like *White v. Peters,* 52 Wn.2d 824, 329 P.2d 471 (1958), where this Court ruled that a jury could find that a leg amputee's

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[10]A case that nicely highlights the significance, to admissibility of a statutory (or regulatory) violation, of the offeror being a member of the class protected by the statute is *Radford v City of Hoquiam.* 54 Wn.App. 351, 773 P.2d 871 (1989). In *Radford,* a member of the public who fell from an open platform at a municipal trash transfer station sought to introduce Washington Department of Labor and Industries' WISHA (Washington Industrial Safety and Health Act of 1973) regulations requiring guardrails. The trial court refused admission because the WISHA regulations were for the protection of employees, not the general public, and thus the plaintiff was not within the class of persons protected by the regulations. *Radford v City of Hoquiam.* 54 Wn.App. at 356. The appellate court agreed.

failure to comply with a restricted license requiring that his car be fitted with a column-mounted braking device contributed to the accident.

> White's noncompliance with the requirements of his restricted driver's license may or may not have been a factor contributing to the accident. Whether his noncompliance is a proximate cause of the accident is a jury question in the circumstances of this case.

White v. Peters, 52 Wn.2d at 828. Under *White,* it was for the jury to decide whether Lutz's lack of licensure was a proximate cause of the accident. As the dissenting Court of Appeals judge noted,

> Contrary to the reasoning of the majority, the test under Holz [*v. Burlington Northern Railroad Company*, 58 Wn. App. 704, 794 P.2d 1304 (1990)] is not whether a party "could have still been negligent even without the endorsement," (Majority at 7) but whether the lack of an endorsement provided evidence of negligence making the accident more or less likely. *Holz*, 58 Wn. App. at 710-11. The situation here is more analogous to *White v. Peters*, 52 Wn.2d 824, 329 P.2d 471 (1958), which the court in Holz recognized reflects the general rule that this is an issue of proximate cause to be decided by the jury. See *Holz*, 58 Wn. App. at 709-10 (recognizing jury question in White because "the evidence supported an inference that the plaintiff's violation of the restriction was a proximate cause of the accident").

Kappelman v. Lutz, ___ Wn. App. ___, ___ P.3d ___, 2007 Wash. App. Lexis 2988, at pp. 23 - 24 (A-19, A-20).

B. The Trial and Appellate Courts Ignored Established Law in Allowing an Emergency Instruction to be Given When Defendant Caused the Emergency

1. Introduction

If this court accepts review, it should also hold that the trial court's giving of the emergency instruction was error.

2. The Emergency Instruction Should Not Have Been Given Because Mr. Lutz's Conduct Caused, at Least in Part, the Emergency

First, the emergency instruction cannot be given where the party invoking the "Emergency Doctrine" (i.e., Mr. Lutz) in whole or in part created the emergency by his own negligence. *Brown v. Spokane County Fire Protection Dist. No.1*, 100 Wn.2d 188, 197, 668 P.2d 571 (1983); *Bennett v. McCready*, 57 Wn. 2d 317, 320, 356 P.2d 712 (1962); *Sandberg v. Spoelstra*, 46 Wn.2d 776, 782-83, 285 P.2d 564 (1955); *Tuttle v. Allstate Ins. Co.*, 134 Wn.App.120, 130 - 31, 138 P.3d 1107 (Div. 2 2006). The majority's decision conflicts with the decisions of this court as set forth above and with Division Two of the Court of Appeals' decision in *Tuttle, supra.* RAP 13.4(b).

Mr. Lutz created the emergency in this case in at least three ways. He operated his motorcycle in violation of his permit in two separate respects: he operated his motorcycle with a passenger (Ms. Kappelman), and he operated it during an hour of darkness. Further and third, he also created the emergency because he was speeding at the time of the accident. Mr. Lutz

admitted he was speeding (traveling at least 65 mph, although plaintiff and the expert contended he was traveling much faster). Mr. Lutz acknowledged that had he not been speeding, the deer might well have completed crossing the road before Mr. Lutz and Ms. Kappelman arrived. RP 205.

Defendant Lutz requested the emergency instruction, and the trial court gave it over plaintiff Kappelman's objection. RP 9 (commencement of trial); RP 360- 361 (exception to jury instructions). Mr. Lutz had the burden to prove that his negligence did not in whole or in part cause or contribute to the emergency. *Sandberg v. Spoelstra*, 46 Wn.2d 776, 782-83, 285 P.2d 564 (1955). "An emergency doctrine instruction is appropriate only when the trier of fact is presented with evidence from which it concludes that the emergency arose through **no fault of the party seeking to invoke the doctrine**." (Emphasis added). *Tuttle* at 131, citing *Brown v. Spokane County Fire Protection Dist. No.1*, *supra* and *Mills v. Park*, 67 Wn.2d 717, 409 P.2d 646 (1966). "The benefit of the emergency rule is applicable only to conduct **after** a person has been placed in a position of peril." (Emphasis added). *Sandberg* at 783. Mr. Lutz and Ms. Kappelman were in peril only because Mr. Lutz's negligence put them in peril.

The majority acknowledged that the question of whether the emergency instruction applied to these facts was a question of law. *Kappelman v. Lutz*, ___ Wn. App. ___, ___ P.3d ___, 2007 Wash. App. Lexis 2988, at p. 10. (A-9). The majority acknowledged that the instruction

is appropriate only when the emergency is not brought about, in whole or in part, by the negligence of the party seeking to invoke the doctrine. *Kappelman v. Lutz,* ___ Wn. App. ___, ___ P.3d ___, 2007 Wash. App. Lexis 2988, at p. 11. (A-9). Yet, the majority held that the instruction should be given if the evidence on that issue was conflicting. *Kappelman v. Lutz,* ___ Wn. App. ___, ___ P.3d ___, 2007 Wash. App. Lexis 2988, at p. 11. (A-9). Although the court of appeals acknowledged that there was substantial evidence that Mr. Lutz created the emergency, it then said: "Mr. Lutz also showed that the emergency, not negligence, caused the accident." *Kappelman v. Lutz,* ___ Wn. App. ___, ___ P.3d ___, 2007 Wash. App. Lexis 2988, at p. 11. (A-9). But the question is not whether the emergency caused the accident; the question is whether Mr. Lutz caused the emergency.

There was no dispute that Mr. Lutz was speeding traveling at least 65 mph, if not more. The evidence was not in conflict on that point.

In any event, if the court of appeals' decision stands, then the well-established rule set forth in the cases cited above (i.e., that the emergency instruction should not be given unless there is substantial evidence that the emergency was not caused in whole or in part by the negligence of the party seeking the instruction) would, in effect, become a nullity, and the instruction would always be given even if there was substantial evidence that the party's negligence caused the emergency. A party seeking the instruction will always deny that his negligence caused the emergency in whole or in part,

just as Mr. Lutz did in this case. But, the denial does not constitute conflicting evidence.

Finally, the error was compounded because the majority refused to allow Ms. Kappelman to introduce evidence of Mr. Lutz's violation of his permit. As the dissenting judge noted, the giving of the emergency instruction compounded the trial court's error because the jury heard only half of the story. While Mr. Lutz was allowed to advance his emergency theory, Ms. Kappelman could not offer opposing evidence of the permit violation. *Kappelman v. Lutz,* ___ Wn. App. ___, ___ P.3d ___, 2007 Wash. App. Lexis 2988, at p. 24-25. (A-20).

VI. CONCLUSION

This court should accept review, reverse the decision of the majority in the court of appeals, vacate the judgment in the trial court, and remand for a new trial.

Dated this 6th day of December, 2007.

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

AMBER L. KAPPELMAN, Appellant, v. THEODORE J. LUTZ, Respondent.	)	No. 24981-6-III Division Three PUBLISHED OPINION

SWEENEY, C.J.—The decision by a trial judge to exclude evidence is a decision vested in the discretion of the trial judge, not us. And we will overturn that decision only when we conclude that the trial judge has abused his or her discretion by refusing to admit the evidence. Here, the judge refused to admit evidence that the operator of a motorcycle did not have the proper endorsement to carry a passenger or drive at night. We are unable to conclude that the trial judge abused his discretion by refusing to admit evidence that the defendant was not properly licensed. We therefore affirm the jury's verdict for the defendant.

FACTS

Theodore J. Lutz took Amber L. Kappelman for a ride on his motorcycle at night. He had only an instructional permit. He did not have a motorcycle endorsement. And so he could not legally carry passengers or drive at night. He struck a deer while on the trip with Ms. Kappelman and she was injured. She sued him for damages.

Mr. Lutz moved at trial to exclude evidence that he was not properly licensed. He argued that the evidence was not relevant and that the prejudicial value of the evidence outweighed its probative value. The trial judge agreed and refused to admit evidence that Mr. Lutz did not have the appropriate state license to carry passengers on his motorcycle or to drive it at night. And the trial judge refused to admit evidence that Mr. Lutz had violated the terms of his permit.

Ms. Kappelman showed that she had no experience on motorcycles. She showed that she was not properly garbed for the ride; she wore only jeans, a tank top, zip-up sweatshirt, and sandals. She showed that Mr. Lutz probably made errors in judgment in maneuvering his motorcycle as he tried to avoid the deer. She showed he was speeding. She showed that he hit the brakes and lost control of the motorcycle. And she showed that all of this took place at night.

The jury nonetheless returned a verdict in favor of Mr. Lutz.

DISCUSSION

Ms. Kappelman contends the court erred by refusing to allow evidence that Mr. Lutz violated the conditions of his permit by carrying her on the motorcycle and driving it at night. We review a trial judge's decision to exclude evidence for abuse of discretion. *Thornton Creek Legal Defense Fund v. City of Seattle*, 113 Wn. App. 34, 58, 52 P.3d 522 (2002). The conclusion "abuse of discretion" turns on whether the judge had tenable grounds or reasons to exclude the evidence. *Braut v. Tarabochia*, 104 Wn. App. 728, 733, 17 P.3d 1248 (2001).

Here, the trial judge concluded that:

> In this case, however, I can't find that the fact that Mr. Lutz was operating without a valid endorsement is really relevant to how he operated the motorcycle.
>
> The real issue in this case is was he . . . was he negligent? Was he speeding? Was he not keeping a proper lookout? Did he lose control of the motorcycle because of his negligence? Did that cause the injury? . . . Mr. Lutz could have been fully qualified as a motorcycle operator and still be negligent. The fact that he wasn't fully qualified under state law as a motorcycle operator doesn't mean that he was or wasn't negligent.

Report of Proceedings (RP) (Motions) at 15.

We conclude those are tenable grounds for this trial judge to exclude the evidence that Mr. Lutz was not properly licensed. Indeed, for us the decision—again, a discretionary decision—was easily supported by compelling case law. *Holz v. Burlington N. R.R. Co.*, 58 Wn. App. 704, 711-13, 794 P.2d 1304 (1990). In *Holz*, the trial court refused to admit evidence that the plaintiff was not properly licensed when he drove his

motorcycle into the side of a railroad car. *Id.* at 705. The Court of Appeals affirmed noting that the crucial question was:

> Would a person with a motorcycle endorsement, enabling that person to ride unsupervised and at night, have been any better off, *i.e.*, any less likely to have suffered the same fate? Riding a motorcycle without supervision at night is not illegal; the Legislature has declared only that doing so without a motorcycle endorsement is.

Id. at 707. The court in *Holz* went on to hold that even if it was relevant, it was inadmissible under ER 403 because it had the danger of unfair prejudice. *Id.* at 708.

The trial judge here applied the same reasoning—would the accident have been less likely if Mr. Lutz had the piece of paper (his motorcycle endorsement) in his back pocket. Ultimately the question is whether the accident would have happened if Mr. Lutz had a proper license, not proper training, experience, or good judgment, but whether he had the piece of paper. The statutory violation here was speeding and reckless driving; statutory violations Ms. Kappelman showed.

Mr. Lutz told the police that he accelerated out of Husum, Washington, at approximately 65 m.p.h. He told the investigative officer that he may have been going 60 m.p.h. when he hit and killed the deer. An accident reconstruction consultant, Robert Stearns, testified that the motorcycle was going in excess of the posted speed limit, 55 m.p.h., before any braking occurred to avoid the deer. He estimated that the motorcycle was going 70 to 77 m.p.h. prior to braking. He stated that was a conservative estimate and "eighty miles an hour would not be unreasonable." RP (Trial) at 246.

Ms. Kappelman testified that during the ride Mr. Lutz kept accelerating to the point where she became "nervous." RP (Trial) at 72. She felt as if she was "being sucked off" due to the speed. *Id.* Ms. Kappelman saw a deer in the left lane, going slowly to the right. At roughly 50 feet from the deer, Mr. Lutz stood on the brakes hard. The motorcycle skidded.

Mr. Stearns testified that the speed at the time of impact depended upon several factors: "[W]ith the vehicle traveling approximately seventy miles an hour prior to the onset of the emergency braking, the impact speed would be approximately sixty-three miles an hour." RP (Trial) at 247.

Ms. Kappelman saw the deer after Mr. Lutz. She estimated this to be 250 to 300 feet away. Mr. Stearns testified that if Mr. Lutz was going 55 m.p.h. and he saw the deer at least 300 feet away he could have stopped safely. Mr. Stearns also explained that Mr. Lutz could have stopped at 60 miles an hour had he seen the deer at least 300 feet away and took his hand off the accelerator.

Mr. Stearns told the jury that "[i]f you encounter something unexpected, and you haven't trained properly for it, the chance of having a tragedy is increased." RP (Trial) at 271.

Ms. Kappelman testified that within a matter of seconds the bike hit the deer. Ms. Kappelman flew off the motorcycle and slid down the roadway approximately 200 feet. The police testified that the skid marks were 41 feet, 6 inches long. The police also

indicated that the bike slid approximately 330 feet without the riders. Both Mr. Lutz and Ms. Kappelman were ejected.

She then showed that (1) Mr. Lutz was inexperienced, (2) he showed poor judgment in carrying a passenger at night, and (3) he reacted poorly to the hazard posed by the deer. Yet the question here, like the question in *Holz*, is whether the accident would have been avoided if Mr. Lutz were properly licensed? The trial judge concluded that it would not have been avoided and that is supported by this record.

At the end of the day, Mr. Lutz is the motorcycle driver he is, with his experience, training, and background. And he reacted the way he did whether or not he was properly licensed. The fact that he was not licensed is not relevant to how and why he drove his motorcycle in the way he did on the evening of this accident, only his driving conduct is relevant.

This case is not distinguishable from *Holz* with one exception: the rule we apply here cut against the defendant in *Holz*. And here it cuts against the plaintiff. That is not a reason to apply the rule differently. In *Holz*, the court concluded that evidence of the lack of a motorcycle endorsement would carry with it "'the danger of unfair prejudice, confusion of the issues, or misleading the jury.'" *Holz*, 58 Wn. App. at 708 (quoting ER 403). Evidence of other bad or illegal acts "'tends to distract the trier of fact from the main question of what actually happened on the particular occasion.'" *Holz*, 58 Wn. App. at 708 (quoting Fed. R. Evid. 404(a) advisory committee note).

The trial judge is generally in a better position to weigh the probative value and the unfair prejudice in a case. *Holz*, 58 Wn. App. at 708. That is why these questions are vested in the discretion of the trial court. *Id.* This is especially true when the trial court excludes evidence "that a person lacked a proper license at the time of an accident because, absent evidence to the contrary, unlicensed status is irrelevant." *Id.*

The real issue here was whether Mr. Lutz was operating the motorcycle in a negligent manner on the day of the accident. His speed, reaction to the circumstances, and inexperience would not have changed with a motorcycle endorsement. *See id.* at 707-09. He could have still been negligent even with the endorsement.

Nor did the trial judge abuse his discretion by refusing to admit evidence that Mr. Lutz was cited. The fact of citation or noncitation is generally inadmissible. *Warren v. Hart*, 71 Wn.2d 512, 514-16, 429 P.2d 873 (1967).

EMERGENCY INSTRUCTION

Mr. Lutz proposed a jury instruction based upon 6 *Washington Practice, Washington Pattern Jury Instruction: Civil* 12.02, at 142 (5th ed. 2005) (WPI):

> DUTY OF ONE CONFRONTED BY AN EMERGENCY
>
> A person who is suddenly confronted by an emergency through no negligence of his or her own and who is compelled to decide instantly how to avoid injury and who makes such a choice as a reasonably careful person placed in such a position might make, is not negligent even though it is not the wisest choice.

Clerk's Paper at 181. Ms. Kappelman objected to the instruction. The court, nevertheless, gave the instruction to the jury.

Ms. Kappelman contends that any emergency here followed Mr. Lutz's own negligence, and he was therefore not entitled to the emergency instruction. *Brown v. Spokane County Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 197, 668 P.2d 571 (1983); *Bennett v. McCready*, 57 Wn.2d 317, 320, 356 P.2d 712 (1960); *Sandberg v. Spoelstra*, 46 Wn.2d 776, 782-83, 285 P.2d 564 (1955); *Tuttle v. Allstate Ins. Co.*, 134 Wn. App. 120, 130-31, 138 P.3d 1107 (2006).

Mr. Lutz responds that he was entitled to the instruction because he was confronted by a sudden emergency placing him in peril, citing *Mills v. Park*.[1] The emergency required him to make an immediate or instinctive choice between alternative courses of action without time for reflection and he did so, citing *Tuttle*.[2] And the emergency was not created wholly or in part by his negligence, citing *Haynes v. Moore*.[3]

First, we consider jury instructions in their entirety. *Brown*, 100 Wn.2d at 194. "Instructions are sufficient if they (1) permit each party to argue his theory of the case, (2) are not misleading, and (3) when read as a whole, properly inform the trier of fact of the applicable law." *Id.* Generally, we review a court's decision to give an instruction

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[1] *Mills v. Park*, 67 Wn.2d 717, 719-20, 409 P.2d 646 (1966).

[2] *Tuttle*, 134 Wn. App. at 130-31.

[3] *Haynes v. Moore*, 14 Wn. App. 668, 669, 545 P.2d 28 (1975).

for an abuse of discretion. *Tuttle*, 134 Wn. App. at 131. But we will review a court's decision to give an instruction based upon a ruling of law de novo. *Id.* Whether the emergency doctrine applies to these facts, thus warranting the giving of the instruction, is a question of law. *Id.*

WPI 12.02 describes the duty of one confronted by an emergency and is identical to the instruction given by the court here. The essential element invoking the emergency doctrine is confrontation by a sudden peril requiring an instinctive reaction. *Seholm v. Hamilton*, 69 Wn.2d 604, 609, 419 P.2d 328 (1966). An instruction on this doctrine is appropriate only when there are facts presented from which the trier of fact could conclude that the emergency arose through no fault of the person seeking to have the doctrine invoked. *Tuttle*, 134 Wn. App. at 131. The instruction is appropriate when the emergency is not brought about, in whole or in part, by the negligence of the party seeking to invoke the doctrine. *Sandberg*, 46 Wn.2d at 783. The court should give the instruction if the evidence is conflicting. *Tuttle*, 134 Wn. App. at 131 (citing *Bell v. Wheeler*, 14 Wn. App. 4, 6, 538 P.2d 857 (1975)).

Ms. Kappelman claims the instruction was not appropriate here because Mr. Lutz created the emergency by his own negligence. Certainly, there was evidence that Mr. Lutz created the emergency by his negligence before the jury. But Mr. Lutz also showed that the emergency, not negligence, caused the accident. Mr. Lutz showed and argued that the accident was caused when he was unable to avoid hitting the deer either by

stopping or moving around it. The situation itself would qualify as a sudden emergency. Mr. Lutz testified he first tried to avoid the deer, but when he determined that was not going to work, he applied his brakes.

Ms. Kappelman presented evidence that Mr. Lutz had time to react and he did not make an instinctive choice. She also showed that he was speeding and thus not entitled to the instruction. The trial court should give the emergency instruction if the evidence is conflicting. *Tuttle*, 134 Wn. App. at 131; *Bell*, 14 Wn. App. at 6. Mr. Lutz presented evidence that he was confronted by a sudden emergency. The instruction was proper. *Tuttle*, 134 Wn. App. at 130-31; *Bell*, 14 Wn. App. at 6.

STATEMENT TO THE INSURANCE ADJUSTER

Ms. Kappelman testified that five weeks after the accident she said that Mr. Lutz could have been going slower, but that she did not blame him for the accident. No one objected. Ms. Kappelman's counsel then asked if he could ask her the circumstances of the statement. He wanted to show that she was talking to Mr. Lutz's insurance adjuster. The court refused to allow further inquiry.

Ms. Kappelman contends that the trial judge abused his discretion. We review a decision to admit or exclude evidence for abuse of discretion. *City of Kennewick v. Day*, 142 Wn.2d 1, 5, 11 P.3d 304 (2000). Again, a court abuses its discretion when no tenable grounds exist for its decision. *Hill v. Cox,* 110 Wn. App. 394, 409, 41 P.3d 495 (2002).

Mr. Lutz's counsel asked Ms. Kappelman on cross-examination if she had previously indicated that she did not blame Mr. Lutz for the accident. She responded: "Yes. I did. I said he could have been going slower and yet I did not blame him. Again, his girlfriend was my friend." RP at 125. There was no objection to the question or the answer.

Ms. Kappelman's counsel then asked that he be allowed to inquire about the circumstances of this statement. He wanted to show that Ms. Kappelman was speaking to Mr. Lutz's insurance agent. The court declined stating the question was proper in cross-examination and went to Ms. Kappelman's credibility. Ms. Kappelman explained on redirect that she did blame Mr. Lutz and made the apparently exculpatory statement because she did not want him to get into trouble.

The court permitted testimony of the circumstances of the statement but refused testimony that the statement was made to an insurance adjuster. Ms. Kappelman was able to testify why she made the statement, not just who she made the statement to. The purpose of the question was to attack her credibility, which is appropriate on cross-examination. *See Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 34, 873 P.2d 498 (1994).

Furthermore, the fact that a defendant in a personal injury case carries liability insurance is not material to the questions of negligence and damages. *Todd v. Harr, Inc.*, 69 Wn.2d 166, 168, 417 P.2d 945 (1966); *see also* ER 411. And the willful, deliberate,

or collusive interjection of such evidence at trial is grounds for a new trial. *Todd*, 69 Wn.2d at 168-69. We conclude there was no abuse of discretion in prohibiting further inquiry here.

EVIDENCE OF THE ACCELERATION CAPABILITY OF THE MOTORCYCLE

The court permitted evidence of the top speed of Mr. Lutz's motorcycle but refused to admit evidence of its acceleration capacity. Ms. Kappelman contends the evidence was relevant and the court's ruling was in error.

We review a decision to admit or exclude evidence for abuse of discretion. *Day*, 142 Wn.2d at 5. Ms. Kappelman claims the evidence was relevant to show that Mr. Lutz could have accelerated from 45 m.p.h. to 90 m.p.h. in a short period of time. But there was evidence about how fast Mr. Lutz was traveling. Mr. Lutz testified that at the time he saw the deer he was going more than 55 m.p.h. He testified he told the officer he was going 60 to 65 m.p.h. Ms. Kappelman testified he was going 80 to 90 m.p.h. How fast he was able to accelerate was not the issue; how fast he was going was the issue. The jury heard evidence regarding his speed. The trial judge did not abuse his discretion by excluding evidence of acceleration capacity.

HOLDING

This case was tried to a jury over the course of three days. The factual question before the jury here was whether Mr. Lutz operated his motorcycle negligently. Whether

he was properly licensed is not relevant to that factual question. The jury here concluded that he was not negligent. That was a question for the jury, not us.

Certainly, the perfect case was not tried here. But the perfect case has not been and never will be tried. The parties here are not entitled to a perfect trial. *Freeman v. Intalco Aluminum Corp.*, 15 Wn. App. 677, 686, 552 P.2d 214 (1976). The integrity of every jury verdict is important, not just those verdicts we approve of.

We affirm the judgment for the defendant, Mr. Lutz.

Sweeney, C.J.

I CONCUR:

Brown, J.

No. 24981-6-III

STEPHENS, J. (dissenting) –I agree with the majority's observation that there is no perfect trial. Yet, parties are entitled to a fair trial, including the ability to present their theory of the case. Moreover, the jury is entitled to decide the facts. By excluding relevant evidence of Theodore Lutz's statutory violation based on the factual determination that it played no part in the motorcycle accident, the trial court improperly prevented Amber Kappelman from arguing her theory of the case, and encroached on the jury's prerogative to determine proximate cause. I would reverse and remand for a new trial.

ANALYSIS

The trial court excluded evidence that at the time of the accident Mr. Lutz was operating the motorcycle in violation of his limited instruction permit, was cited, admitted to the infraction and paid the fine. The majority describes the issue as whether having "the piece of paper (his motorcycle endorsement) in his back pocket" would have made the accident less likely. Majority at 4. This misses the significance of the issue. A motorcycle endorsement is not simply a "piece of paper." The motorcycle endorsement program under chapter 46.20 RCW is designed to assure that motorcycle operators have

the skills necessary for safe on-street operation. *See* RCW 46.20.515; RCW 46.81A.001 (purpose). This is consistent with the general purpose of the chapter to prevent reckless or negligent drivers from operating vehicles on the public highways. *Frank v. Dep't of Licensing*, 94 Wn. App. 306, 311, 972 P.2d 491 (1999). In order to obtain a motorcycle endorsement, a person must be able to demonstrate the ability to safely maneuver a motorcycle, "including emergency braking and turning as may be required to avoid an impending collision." RCW 46.20.515. Because a person who has merely an instruction permit is still learning to ride a motorcycle and has not yet passed a motorcycle driving test, he or she may not carry passengers or drive during hours of darkness. RCW 46.20.510(2). It is undisputed that Mr. Lutz violated RCW 46.20.510(2).

Notably, the trial court recognized that Mr. Lutz's inexperience operating a motorcycle was relevant (Report of Proceedings (Motions) at 16), yet disallowed evidence of the statutory violation to show such inexperience constituted negligence. Because inexperience may not necessarily indicate negligence in a particular setting, however, evidence of the statutory violation was not only relevant but necessary to provide the jury a context in which to evaluate Mr. Lutz's inexperience. Given that the central purpose of the motorcycle endorsement program is to assure that motorcycle operators possess the necessary skills for safe on-street driving, a motorcycle endorsement bears directly on the experience of the operator. The majority gives too little credence to the purpose of a motorcycle endorsement when it concludes: "[Mr.

Lutz's] speed, reaction to the circumstances, and inexperience would not have changed with a motorcycle endorsement." Majority at 7.

The trial court refused to allow evidence of the statutory violation without applying the proper analysis to determine admissibility. Although there was much argument and briefing on this issue, the trial court did not address RCW 5.40.050 or the test under *Restatement (Second) of Torts* § 286 (1965) in its ruling on the motion in limine. A court's discretionary decision is untenable if it was reached without applying the proper legal standard. *T.S. v. Boy Scouts of Am.*, 157 Wn.2d 416, 423-24, 138 P.3d 1053 (2006). The majority does not address this. RCW 5.40.050 states that a breach of duty imposed by a statute may be considered by the trier of fact as evidence of negligence. A statute may impose a duty that differs from the duty of ordinary care. *Mathis v. Ammons*, 84 Wn. App. 411, 416, 928 P.2d 431 (1996), *review denied*, 132 Wn.2d 1008 (1997). For more than 30 years, Washington has followed the four-part test set forth in the *Restatement (Second) of Torts* § 286 (1965) to determine if a statute imposes such a duty. *Id.; see also Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 269, 96 P.3d 386 (2004). Under this test:

> The statute's purposes, exclusively or in part, must be (1) to protect a class of persons that includes the person whose interest is invaded; (2) to protect the particular interest invaded; (3) to protect that interest against the kind of harm that resulted; and (4) to protect that interest against the particular hazard from which the harm resulted.

Mathis, 84 Wn. App. at 416. When a statute meets this test, evidence of a statutory violation is admissible on the issue of negligence. *Id.* at 417-18. And the party offering the evidence is entitled to a jury instruction consistent with RCW 5.40.050. 6 WASHINGTON PRACTICE, WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 60.03, at 481 (2005) (WPI); *see Barrett*, 152 Wn.2d at 274-75.

Ms. Kappelman demonstrated that evidence of Mr. Lutz's statutory violation meets the *Restatement* test. As noted, the general purpose of chapter 46.20 RCW is to prevent reckless or negligent drivers from operating vehicles on the public highways. The class of people protected by the motorcycle endorsement program includes citizens who share the public highways with motorcycle operators. This certainly includes Ms. Kappelman.

The second and third *Restatement* inquiries ask whether RCW 46.20.510 was intended to protect against the interest invaded and the harm that resulted. *See Barrett*, 152 Wn.2d at 273. The statute here undeniably sought to protect Ms. Kappelman from being injured in a motorcycle accident.

Finally, the statutory purpose and language make clear that RCW 46.20.510 was aimed to protect against the type of danger that caused Ms. Kappelman's injuries. *See Barrett*, 152 Wn.2d at 273. The motorcycle endorsement program is designed to promote motorcycle safety and protect others from harm that may result from a driver lacking the experience and skill necessary to obtain a motorcycle endorsement. *See* RCW 46.20.515,

.520; RCW 46.81A.001. Because Ms. Kappelman established that RCW 46.20.510 met the requirements of *Restatement* § 286, *supra*, the evidence of Mr. Lutz's statutory violation was evidence of negligence that should have been admitted under RCW 5.40.050.[1]

In affirming the trial court's exclusion of this evidence, the majority finds persuasive its reliance on *Holz v. Burlington N. R.R. Co.*, 58 Wn. App. 704, 794 P.2d 1304 (1990). In that case, 16-year-old Jody Holz died after driving his motorcycle into a black railroad tank car that was straddling an unlit county road. *Id.* at 705. His family brought a wrongful death suit against the railroad and the county. *Id.* The trial court granted the family's motion to exclude any reference to the fact that Jody did not have a motorcycle endorsement at the time of the accident and was violating the terms of his instruction permit. *Id.* at 705-06. After a jury found the railroad 95 percent responsible, it appealed, claiming the court erred in excluding reference to Jody's statutory violation. *Id.* at 706. The court of appeals affirmed, concluding on the facts of the case that the statutory violation was not a proximate cause of the accident. *Id.* at 708-10.

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[1] Whether the trial court properly excluded evidence of the citation and infraction presents a different issue. I agree with the majority that evidence of a citation is generally inadmissible opinion testimony. *See* Majority at 7; *Billington v. Schaal*, 42 Wn.2d 878, 882, 259 P.2d 634 (1953). Evidence of an admitted infraction, while generally allowed as an admission against interest, may be excluded as cumulative when the opponent otherwise admits a statutory violation. *Henry v. Leonardo Truck Lines*, 24 Wn. App. 643, 644-45, 602 P.2d 1203 (1979). Accordingly, though the trial court erred in excluding all evidence of Mr. Lutz's statutory violation, it was within its discretion to limit the evidence and exclude the citation and admitted infraction.

Significantly, *Holz* was decided on the narrow ground that no reasonable jury could find a causal link between the statutory violation and the accident. The court explained:

> Here, there was no testimony or other evidence that a holder of a motorcycle endorsement, even if more experienced and knowledgeable than Jody Holz, would have been less likely to collide with Burlington Northern's tank car. Speed was not a significant factor. . . . Knowing the relevant facts, the jury concluded the accident was due almost entirely to Burlington Northern's failure to exercise due care at a time when visibility was crucial to a licensed or unlicensed rider alike.

58 Wn. App. at 710-11 (footnote omitted). The court further observed that the railroad "[did] not point to any portion of the record or even argue that Jody Holz was less experienced or knowledgeable than a holder of a motorcycle endorsement." *Id.* at 710 n.5. "The evidence indicates that the problem was a lack of visibility, not any lack of skill, capability, or care that a fully licensed rider would have possessed or exercised but which Jody Holz did not." *Id.* at 712.

In contrast to *Holz*, Mr. Lutz's skill, capability and care as a motorcycle operator were squarely at issue in this case. Contrary to the reasoning of the majority, the test under *Holz* is not whether a party "could have still been negligent even without the endorsement," (Majority at 7) but whether the lack of an endorsement provided evidence of negligence making the accident more or less likely. *Holz*, 58 Wn. App. at 710-11. The situation here is more analogous to *White v. Peters*, 52 Wn.2d 824, 329 P.2d 471 (1958), which the court in *Holz* recognized reflects the general rule that this is an issue of

proximate cause to be decided by the jury. *See Holz*, 58 Wn. App. at 709-10 (recognizing jury question in *White* because "the evidence supported an inference that the plaintiff's violation of the restriction was a proximate cause of the accident"); *White*, 52 Wn.2d at 828 (holding, "[w]hether his noncompliance is a proximate cause of the accident is a jury question in the circumstances of this case"). The majority erroneously reads *Holz* as providing a general rule of exclusion, as did the trial court. The result is that the jury in this case was deprived of probative evidence of negligence, and asked to render a verdict without the benefit of having all the facts.

I respectfully dissent.[2]

Stephens, J.

[2] I have no quarrel with the majority's resolution of the other issues raised by Ms. Kappelman. I note, however, that the giving of the emergency instruction based on WPI 12.02, while not error in itself, compounded the court's error in not allowing Ms. Kappelman to present evidence of Mr. Lutz's statutory violation. A claim of emergency is appropriate in defense to a claim of negligence based on a statutory violation. WPI 60.01.01, Comment, at 479 (2002); *see e.g., Wood v. Chicago, M., St. P. & P. R.R. Co.*, 45 Wn.2d 601, 608, 277 P.2d 345 (1954). Here, the jury heard only half of the story, as Mr. Lutz was allowed to advance his emergency theory but Ms. Kappelman was not allowed to offer opposing evidence of the statutory violation.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on December 6, 2007, I filed the foregoing **PETITION FOR REVIEW**, by FAX TO 509 456-4288 and by sending an original and one (1) copy by regular mail, enclosed in a sealed envelope and addressed to:

Administrator Division III
Washington State Court of Appeals
P O Box 2159
Spokane, Washington 99201

I further certify that on December 6, 2007, I served one (1) copy of the foregoing **PETITION FOR REVIEW**, by sending it via regular mail, enclosed in a sealed envelope and addressed to:

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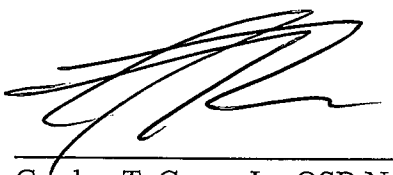

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